In The Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1467

UNITED STATES GYPSUM COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Petitioners,

-vs-

JACKSONVILLE BUSINESS SERVICES, INC., LIBERTY MUTUAL INSURANCE COMPANY, JOHN ANDERSON, and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK W. SHAW, JR.
MATHEWS, OSBORNE, EHRLICH, McNATT, GOBELMAN & COBB
1500 American Heritage Life Building
Jacksonville, Florida 32202
Attorney for Respondents

INDEX

TABLE OF CONTENTS

CASES CITED

CASES CITED (Cont'd)

CASES CITED (Cont'd)

STATUTES CITED

Rules of Court Cited

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1467

UNITED STATES GYPSUM COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Petitioners,

-vs-

JACKSONVILLE BUSINESS SERVICES, INC., LIBERTY MUTUAL INSURANCE COMPANY, JOHN ANDERSON, and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Issuance of a writ of certiorari is, of course, a discretionary matter, and the writ will not be issued where the cause does not present questions of sufficient gravity. *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). The mere presence of jurisdiction upon a petition for such writ

does not determine the exercise of that jurisdiction. *Hammerstein v. Superior Court of California,* 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135 (1951). Rather, a writ of certiorari is granted or denied in the exercise of a sound discretion. *Philadelphia & Reading Coal and Iron Co. v. Gilbert,* 245 U.S. 162, 38 S.Ct. 58, 62 L.Ed. 22 (1917). Respondent respectfully submits that the instant cause is among those as to which that discretion should be exercised by denying the petition.

ARGUMENT

1. WHETHER A STATE APPELLATE TRIBUNAL, *SUA SPONTE,* MAY WITHOUT VIOLATING DUE PROCESS, REVERSE THE COMPREHENSIVE DECISION OF A TRIAL JUDGE SOLELY BECAUSE MECHANICAL FAILURE OF A RECORDING MACHINE PREVENTED TRANSCRIPTION OF THE EVIDENCE ADDUCED AT TRIAL?

Petitioner initially contends that it is a violation of the Due Process Clause of the Fourteenth Amendment for a State to provide the procedural remedy of remanding a cause for a *de novo* trial when, through no fault of any party to the cause, it is impossible to present to the appellate tribunal a record of the proceedings below. Petitioner contends that where the original tribunal has rendered a decision, and it becomes impossible -- without fault on the part of anyone -- to present a record of the initial proceedings to an appellate tribunal, then the appellant must suffer the consequences.

The basic weakness of this suggestion can be readily seen

from the following hypothetical. Assume that the Judge of Industrial Claims in the instant cause did in fact commit reversible error, and the record would clearly reveal that fact. Is the appellant to be deprived of the benefit of an error-free adjudication (or of the right to appeal where error exists) simply because a tape recorder malfunctions -- especially where the relevant statutory provisions place the burden of preparing the record on the adjudicatory body, rather than on the appellant -- in order to assure due process? Clearly, such a holding would itself be a denial of due process of law, since it would deprive the appellant of his rights due to a matter beyond his control and as to which the statutory burden is on another. Nor, in all candor, would it comport with due process to reverse the lower tribunal and direct it to enter a judgment contrary to the one it originally had entered. Rather, it is submitted, the course of essential justice is that chosen by the appellate tribunals in the instant cause -- to remand the action for *de novo* treatment. In this manner, neither side bears the ultimate penalty of losing its suit because of a mere mechanical malfunction for which neither bears the brunt of responsibility.

Although this particular type of situation appears to be relatively rare, it is not totally without precedent. Courts in other states have also adopted the solution of a remand for *de novo* treatment where, for some reason, a record of the proceedings in the lower tribunal is unavailable on appeal. See, for instance; *Scharff v. Holschbach,* 220 Mo. App. 1139, 296 S.W. 469; *Woods v. Bottmos,* 206 S.W. 410; *Todd v. Security Ins. Co.,* 206 S.W. 412; *Reynolds v. Romano,* 96 Vt. 222, 118 A 810; *Coan v. Plaza Equity Elevator Co.,* 60 N.D. 51, 232 N.W. 298; *Fire Ass'n. of Philadelphia v. McNerney,* 54 S.W. 1053; *Shafer v. King,* 82 Colo. 258, 259 P. 1042;

Harris v. First Nat. Bank of Pryor Creek, 140 Okla. 269, 282 P. 1097; *Gibson v. City of Chickasha*, 171 Okla. 284, 43 P. 2d 95.

The Constitution fixes limits on the administrative process by prohibiting, without due process of law, the deprivation of property from any individual. When the Legislature acts directly, it is subject to judicial scrutiny. When the Legislature acts indirectly by working through quasi-judicial bodies, this scrutiny cannot be evaded by preventing review by the Industrial Relations Commission or by the courts simply because, through no fault of the parties, no record was available and by praying instead that findings of fact unsupported by any record evidence be accepted in lieu of a transcript:

> "Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction . . ."

St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 89 L.Ed. 1033, 1041 (1935).

To say that the complete absence of a record does not require a hearing *de novo* is to say in effect that the Judge of Industrial Claim's findings are conclusive and that a blameless Appellant is to suffer the consequences regardless of where true justice might lie.

In addition to the cases in civil actions from other jurisdictions noted above, both this Court and the Supreme Court of Florida have held squarely that the absence of a record of proceedings in an administrative body, or material parts thereof, requires a hearing *de novo*. In *Kwock Jan Fat v.*

Edward White, 253 U.S. 454, 40 S.Ct. 566, 64 L.Ed. 1010, 1014 (1919), petitioner, a person of Chinese descent, sought re-admission to the United States from China, claiming American citizenship by birth. After a hearing, a final decision by the examining inspector adverse to petitioner was affirmed by the Commissioner of Immigration and the Secretary of Labor. Petitioner filed a petition for writ of habeas corpus contending, *inter alia*, that the examining inspector did not record an important part of the testimony of three witnesses called by petitioner, with the result that that testimony was not before the Commissioner of Immigration or the Secretary of Labor when they reviewed the case. After deciding that the missing portions of the record were material and relevant, this Court went on to say:

> "The acts of Congress give great power to the Secretary of Labor over . . . persons of Chinese descent. . . . It is the province of the courts, in proceedings for review, . . . to prevent abuse of this extraordinary power, *and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment.* For failure to preserve such a record for the information, not less of the commissioner of immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. 253 U.S. at 464 (Emphasis supplied.)

In *Lieber v. Morris Lieber, Inc.*, 168 So. 2d 313 (Fla. 1964), the employer and carrier, in a compensation matter, asked the Industrial Relations Commission for a *de novo* hearing because no record of proceedings below was available. The Industrial Relations Commission granted the new

hearing and the claimant filed a Petition for Writ of Certiorari. The Supreme Court of Florida cited F.S. § 440.29(2) in support of its affirmance of the granting of the *de novo* hearing, and went on to say:

> "We believe, however, that a de novo hearing upon the claim necessarily encompasses a quashal of the award previously made and the entry of an order anew by the deputy based solely upon such evidence as may now be proffered." (168 So. 2d at 313)

Thus the fact that a Record cannot be prepared is grounds for the quashal of the Order below and the holding of a new hearing, with the subsequent Order to be based solely upon the new evidence.

The Supreme Court of Florida dealt with a similar situation in *Warddell v. Tropicana Products, Inc.*, 256 So. 2d 212 (Fla. 1971). In that case, portions of the record could be prepared, but the record as a whole was so poor as not to be a sufficient basis for consideration by an appellate authority. The Court quoted with approval the *Lieber* decision, *supra*, and went on to say:

> "We can only conclude that the affirmative requirement of the compensation law that testimony shall be reported and orders reviewed upon a transcript is not met by this record. We do not think that *Lieber* can be distinguished on the theory that there the transcript was unobtainable, whereas in the instant case a partial transcript was submitted. A partial transcript as incomplete as that submitted here is of no more value than would be an absent transcript." (256 So. 2d at 214)

It is submitted that where the burden of preparing a record for the appellate tribunal is expressly placed on one other than the appellant, and that burden is not met, there is no denial of due process in the appellate tribunal remanding the cause for *de novo* treatment, so long as the failure to prepare the record is not due to the acts or omissions of the appellant.

2. WHETHER THE APPELLATE TRIBUNALS OF FLORIDA MAY WITHOUT VIOLATING THE RIGHT TO EQUAL PROTECTION OF PARTIES TO WORKMEN'S COMPENSATION ACTIONS, SET ASIDE TRIAL JUDGES' DECISIONS IN WORKMEN'S COMPENSATION CASES SOLELY BECAUSE NO RECORD OF SUCH HEARINGS IS AVAILABLE FOR APPEAL, WHILE REFUSING TO SET ASIDE DECISIONS IN COMMON LAW ACTIONS DESPITE THE SAME UNAVAILABILITY OF TRANSCRIPT?

The question presented by the Petitioner under this heading is whether the Equal Protection Clause of the Fourteenth Amendment is contravened where, due to the fact that no record of the proceedings in the administrative hearing can be prepared due to a mechanical malfunction in the recording device, the appellate tribunal quashes the Order below and remands the cause for *de novo* treatment, where such course would not be followed if the appeal were one in a common-law civil action. Respondent submits that there is no denial of equal protection under these circumstances.

In order to comply with the requirements of the Equal Protection Clause, classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike. *Silver Blue Lake Apartments v. Silver Blue Lake Home Owners Assoc.*, 225 So. 2d 557 (Fla. App. 3d 1969). When the difference between those included in a class and those excluded from it bears a substantial relationship to the public purpose, the classification does not deny equal protection of the laws. *Daniels v. O'Connor*, 243 So. 2d 144 (Fla. 1971).

It is clear that the procedure here involved does not discriminate among persons involved in the workmen's compensation system by favoring either employers or employees. It is neutral, both facially and as applied. Petitioner does not even contend otherwise; rather, Petitioner's contention is that it is a denial of the equal protection of the laws to apply a different procedure in appeals from initial adjudications in workmen's compensation matters than the procedures applied in civil actions in the court system. Such contention is completely without merit.

Initially, it may be noted that the entire workmen's compensation system follows a different set of procedural guidelines than that applicable to civil actions in general; yet this has been held not to constitute a denial of equal protection of the laws. *Carter v. Sims Crane Service, Inc.*, 198 So. 2d 25 (Fla. 1967); *Carroll v. Zurich*, 286 So. 2d 21 (Fla. App. 1st 1973); *Gross v. Rudy's Stone Co.*, 179 So. 2d 603 (Fla. App. 2d 1965). Procedures in workmen's compensation matters differ in many ways from those applied in civil actions.

By way of illustration, the Supreme Court of Florida has held that a Judge of Industrial Claims is to be accorded "broad discretion" in considering evidence, *Tolvanen v. Eastern Air Lines*, 287 So. 2d 299 (Fla. 1973). By statute the Judge of Industrial Claims has the right to receive evidence of transactions with a decedent which are inadmissible at common law and under Florida statutory law. Compare F.S. & 440.29 and *Heath v. Thomas Lumber Co.*, 140 So. 2d 865 (Fla. 1962) with F.S. § 90.05. Further, the Judge of Industrial Claims is not bound by "technical or formal rules of procedure." F.S. § 440.29.

Because the intent of the workmen's compensation statute is to procure for the workman the most expeditious resolution of his claim and consequent prompt payment of benefits, hearings before the Judge of Industrial Claims are properly subject to different rules of evidence and procedure than suits at common law.

These differences between workmen's compensation hearings and actions at common law provide a rational basis for requiring the Judge at a compensation hearing to prepare a record and for remanding a cause for a *de novo* hearing if no record is transmitted to the Industrial Relations Commission or to a reviewing court. The function of the reviewing court is, *inter alia*, to determine if the findings which the Judge has made are supported by the evidence. *Hardy v. City of Tarpon Springs*, 81 So. 2d 503 (Fla. 1955). Because there is no record in this case, neither the Industrial Relations Commission nor the reviewing court can perform their function, and, absent remand for *de novo* treatment, the rights of the parties would be conclusively, and without hope of recourse,

determined by the Judge of Industrial Claims.

The basis for the particular distinction here involved may be found in the differences in procedure between workmen's compensation matters and general civil actions as to the responsibility for preparing and presenting a record of the proceedings in the initial tribunal. In the case of civil actions generally, it is the duty of the appellant to ensure that a transcript of the proceedings is prepared and timely filed. Rule 3.6d(2), Florida Appellate Rules. In workmen's compensation proceedings, on the other hand, that duty is expressly placed on the administrative body by F.S. § 440.29(2), which states in pertinent part:

> "Hearings before the judge of industrial claims shall be open to the public and shall be reported, and the division is authorized to contract for the reporting of such hearings. The division shall by regulation provide for the preparation of a record of the hearings and other proceedings before judges of industrial claims . . . ."

Unlike appeals from the Circuit Court, where the burden to provide a record is on the party urging error, the onus of making a ecord available for appellate review in workmen's compensation cases is on the Judge of Industrial Claims. There is a rational basis for this distinction.

And if the burden of providing a record is on one other than the appellant, it logically follows that the consequences of failing to meet that burden should not fall on the appellant, just as it is logically consistent in civil actions to penalize the appellant for failing to meet his burden.

Petitioner makes much of those Florida decisions holding that the Industrial Relations Commission is similar in many regards to the intermediate appellate courts of our state, the District Courts of Appeal. Petitioner's apparent purpose is to equate them, and thus to demonstrate an inequality. What Petitioner fails to point out, however, is that the decisions cited deal with the question of the scope of appellate review (and the proper court to perform such review, the Supreme Court of Florida being a court of limited jurisdiction) of decisions of the Industrial Relations Commission.

The hearing of workmen's compensation cases has consistently been held by Florida Courts to be administrative or quasi-judicial in nature. *Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939); *Scholastic Systems v. LeLoup*, 307 So. 2d 166 (Fla. 1974). In the latter case, the Supreme Court of Florida expressly held the Industrial Relations Commission to be a *quasi-judicial* body equivalent, for certain limited purposes, to a court, and analogized it to the "Article I" courts of the federal system. It may be noted in passing that such courts often have their own procedural rules not applicable in actions brought in a United States District Court; under Petitioner's argument, such rules would be unconstitutional. Clearly they are not, and equally clearly, the procedures here in question do not deprive Petitioner of the equal protection of the laws.

CONCLUSION

The Order of the Industrial Relations Commission, *sua sponte*, reversing the Order of the Judge of Industrial Claims, and requiring a *de novo* hearing, was a proper application of the law. Without the benefit of a transcript of the proceedings, appropriate appellate review cannot take place; the responsibility of preparing a record, resting with the Judge of Industrial Claims, has not been met, but neither due process nor equal protection of the laws requires that Respondent be penalized for that situation.

Respectfully submitted,

Jack W. Shaw, Jr.

JACK W. SHAW, JR.

MATHEWS, OSBORNE, EHRLICH,
McNATT, GOBELMAN & COBB
1500 American Heritage Life Building
Jacksonville, Florida 32202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered to Luke G. Galant, Attorney for Petitioners, 320 E. Adams Street, Jacksonville, Florida 32202, by first class mail, postage pre-paid, this 5th day of May, 1976.

MATHEWS, OSBORNE, EHRLICH,
McNATT, GOBELMAN & COBB

Jack W. Shaw, Jr.

JACK W. SHAW, JR.
Attorney for Respondents

APPENDIX

App. "A"

F.S. § 440.29

440.29 Procedure before the commission or judges of industrial claims.—

(1) In making an investigation or inquiry or conducting a hearing the judge of industrial claims shall not be bound by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry, or conduct such hearing in such manner as to best ascertain the rights of the parties. Declaration of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

(2) Hearings before the judge of industrial claims shall be open to the public and shall be reported, and the division is authorized to contract for the reporting of such hearings. The division shall by regulation provide for the preparation of a record of the hearings and other proceedings before judges of industrial claims and shall be permitted to charge for transcripts of testimony and copies of any instrument the same fees as are allowed by law to reporters and clerks of courts of this state for like services.

(3) The practice and procedure before the commission and the judges of industrial claims shall be governed by rules adopted by the Supreme Court.

App. "B"

F.S. § 90.05

90.05 Witnesses: as affected by interest.—No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party, or interested person, derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

App. "C"

Florida Appellate Rule 3.6 d (2)

(2) *Designation to Reporter.* When any proceedings in the lower court have been stenographically reported, and have not been transcribed, the appellant, within the time for filing and serving assignments of error, shall file, and serve upon the appellee, a designation of such parts of said proceedings as he shall deem necessary for the appeal or an affirmative statement that he does not deem any part of such proceedings necessary. Within 10 days thereafter, the appellee shall file and serve upon the appellant a designation of such additional parts of said proceedings as he shall deem necessary for the appeal or an affirmative statement that he does not deem any part of such proceedings necessary. If appellant is served with cross assignments of error he shall have 10 days thereafter to file additional designations to the reporter. The original of such designations shall be filed with the clerk of the lower court and copies served on the reporter and the adverse party or his attorney.